IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.1253 OF 1995

Kirloskar Power Equipments Limited
(formerly known as Voltas Transformers
Ltd.) .. .. Petitioner

Versus

1. R.R.Bajoria,
Commissioner of Income-tax.

2. L.K.Koolwal,
Commissioner of Income-tax.

3. M.B. Kodnani

4. Union of India

5. Voltas Ltd. .. .. Respondents

Mr.Persy Pardiwala i/by M/s.Mulla & Mulla for petitioner.

Mr.M.I. Sethna with Mr.Ashokan for respondent Nos.1 to 4.

Mr.Sachin Chandarana i/by M/s.Manilal Kher Ambalal & Co. for respondent No.5.

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**CORAM : H.L. GOKHALE, ACTING C.J. &**
**J.P. DEVADHAR, JJ.**

**DATE OF RESERVING THE JUDGMENT: 5th December 2006**

**DATE OF PRONOUNCING THE JUDGMENT: 22nd February 2007**

**JUDGMENT : (Per H.L.Gokhale, Acg. C J.)**

1. This Writ Petition under Article 226 of the Constitution of India seeks to challenge and set aside the order dated 23rd February 1995 passed by respondent Nos.1 to 3, whereby the property which was to be purchased by the petitioner-Company from respondent No.5 was

directed to be compulsorily acquired by respondent Nos.1 to 3 acting together as the Appropriate Authority under Chapter XX-C of the Income Tax Act, 1961 (for short "the said Act"). Respondent No.4 to this Petition is Union of India. The impugned order has been stayed during the pendency of this Writ Petition but the formal order of issuance of Rule remained to be passed. Hence, we issue Rule on the Petition. Replies and further Affidavits are already filed by the parties.

2. Brief facts leading to this Petition are as follows:-

. Respondent No.5 was carrying on amongst other activities the business of manufacturing the electric transformers at its factory situated at Nagar Road, Pune. Sometimes in March 1993 Voltas Transformers Ltd. (the petitioner referred by its earlier name) was incorporated as a wholly owned subsidiary of respondent No.5 with the main object of taking over the transformer business of respondent No.5. The entire shareholding of respondent No.5 in this Voltas Transformers Ltd. has been subsequently transferred in favour of Kirloskar Group of Companies. The name of Voltas Transformers Ltd. was thereafter changed to the present name viz. Kirloskar Power Equipments Limited (the petitioner herein). The certificate

issued by the Registrar of Companies dated 10th January 1996 was produced in this proceeding by filing a Civil Application bearing No.2133 of 2004 and this Court by its order passed on 16.12.2004 permitted the substitution of the name of Kirloskar Power Equipments Limited in place of Voltas Transformers Ltd. as the petitioner.

3. Four Agreements were entered into after the incorporation of Voltas Power Equipments Limited between it and respondent No.5, details of which are as follows:-

(i). By the first Agreement dated 30th September 1993, it was agreed that respondent No.5 will transfer to Voltas Transformers Ltd. the transformer undertaking as a going Concern together with all its employees and assets and properties consisting of immovables, movables, liabilities etc.

(ii). Accordingly, by a Deed of Assignment and the Transfer of Undertaking dated 7th July 1994 entered into between the two parties, respondent No.5 transferred the undertaking as a going Concern. This was for a consideration of Rs.9.42 Crores.

(iii). Thereafter the third document was entered into between the parties on 13th July 1994 which was a Deed of lease of that very land. This lease was for a period of eight years for a consideration of Re.1/- per year. The land leased out was admeasuring approximately 39,545.50 Square Meters on which the factory building was standing.

(iv). The fourth document was entered into between the parties on 11th November 1994, whereby the parties mutually agreed to extend this period of lease for a period of 99 years with effect from 1st April 1995 for a one time consideration comprising of a premium of Rs.80 Lakhs with a lease rent of Re.1/- per annum.

4. This fourth document was lodged with the Appropriate Authority along with the prescribed Form 37-I duly signed by respondent No.5 - Voltas Limited on the very day as per the requirement of Section 269 UC(3) of the said Act. Respondent No.5 thereafter received on 14th February 1995 a Notice dated 9th February 1995 from the Appropriate Authority to show cause as to why an order under Section 269UD (1) of the said Act should not be made directing the purchase of the

said property by the Central Government for an amount equal to the apparent consideration of Rs.80 Lakhs specified in the Agreement dated 11.11.1994. This was on the basis of a solitary sale instance as stated in the Notice, of a certain land at Vadgaon Sheri nearby Pune which was agreed to be sold by the parties to on Agreement dated 27th August 1992 for a consideration of Rs.51 Lakhs. The total area of that property was 7062.43 Square Meters and the rate per Square Meter of FSI was worked out as Rs.577/-. The discounted rate was reduced to Rs.568/-, whereas the rate of the petitioner's property (after reducing the estimated value of the building thereon) was arrived at Rs.244/-. The notice called upon respondent No.5 to remain present at 3.30 p.m. on the very day of the receipt of notice i.e. on 14th February 1995 at the Ayakar Bhavan, Pune. Hence, on the next day which was at the earliest i.e. on 15th February 1995 the 5th respondent gave an application to the Appropriate Authority. It was signed by one Mr.B.D. Mehta, their General Manager. The said letter reads as follows:-

> " We have received your above Notice dated 9.2.95 on 14.2.95 in the evening, asking

> us to attend before you on 14.2.95. In view of the late receipt of the Notice, we would request you to kindly let us have an another date for hearing with sufficient notice. "

5. It is the case of the petitioner that in spite of giving of this letter the proceeding was adjourned only to the next day i.e. on 16th February 1995 when the officers of respondent No.5 were asked to give their written submissions which they accordingly submitted on that date. This reply consisted of 16 paragraphs. In paras 12 and 13 with respect to the merits of their case respondent No.5 stated as follows:-

> "12. Even on merit, we would like to submit as follows :
>
> a) The proposed transfer involves lease of land and not outright sale.
>
> b) The consideration stipulated in the Agreement is fair and reasonable and represents the current market value of land. In fact, no transaction for sale of land as such in the vicinity of the said

Undertaking seems to have taken place in the recent past.

c) The instance of property cited in the Appropriate Authority's letter dated 9.2.95 is clearly distinguishable. It was a case of the sale of land and building together. Further, we understand that the actual sale of the said property has not taken place till date, as per '7/12' record. Landlord of the bungalow i.e. original seller, continues to stay there.

d) The Sale Instance Property (SIP) referred to in the notice relates to alleged sale transaction in Vadgaon Sheri, Pune. The Property Under Consideration (PUC) is situate in Lohagaon which is a different area. The PUC transaction is of lease whereas the SIP transaction is allegedly a sale. The PUC transaction is in respect of an encumbered property because it flows from and is incidental to the transfer of an Industrial Undertaking as a going concern with all its rights and liabilities. Besides, the transferor continues to have a right of access

through the PUC to the adjacent property of the transferor. The SIP is not, therefore, a comparative transaction in any manner.

13. On similar facts, the Appropriate Authority, Ahmedabad has approved a transfer of property (from Voltas and another) vide No.AHD/AA/796/93-94 dated 24.5.94. "

Further, in paragraphs 15 and 16 it is stated as follows:-

" 15. The Show cause notice 9.2.95 required us to attend a hearing before the Appropriate Authority on 14.2.95 at 3.30 p.m. at Pune. This notice was received by us at Bombay on the evening of 14.2.95. The said notice though dated 9.2.95 appears to have been despatched by the Ahmedabad Office of the Appropriate Authority on 13.2.95 by Speed Post.

Immediately on the receipt of the notice, we responded by our letter of 15.2.95 requesting for sufficient time. This

letter of 15.2.95 was delivered at the Pune Office at the Appropriate Authority at 3.00 p.m. on 15.2.95. Our representative who delivered this letter was notified that the hearing stands refixed at the same venue at 3.00 p.m. on 16.2.95.

Besides, the transferee i.e. Voltas Transformers Ltd. which also has its office at the same location as the transferor, and who is a material party to the transaction does not appear to have received the said notice till 15.2.95.

16. Having regard to what we have stated in respect of SIP, it would be just, fair and proper that we are furnished with more details of SIP and given sufficient time to make enquiries about SIP / other comparable transactions, if any, so that the transaction of PUC is evaluated in right perspective. "

6. The case of the petitioner is that the petitioner was not served with any notice and the representation made by respondent No.5 was also

not properly considered. Respondent Nos.1, 2 and 3 thereafter proceeded to pass an order directing the purchase. This order was passed on 23rd February 1995. In para-4 of the order, the appropriate Authority rejected the submissions of respondent No.5. In sub-para (i) thereof, it recorded that the present transaction related to the land only and not an entire business undertaking as claimed. In sub-para (ii) it justified the calculation of the rate. In sub-para (iii) it observed that the property of the petitioner and the subject instance property were situated at equi-distance from Pune and the property of the petitioner was in fact at a superior location. In sub-para (iv), the appropriate Authority recorded that in the present case the transaction was only in respect of a lease and the case of similar transfer at Ahmedabad was cleared on 24th November 1994 by appropriate Authority for the composite transfer of going business with land. The appropriate Authority, therefore, directed the compulsory purchase which is under challenge in the present Petition.

7. Mr.Pardiwala, learned Counsel appearing for the petitioner, submitted that the judgment of

the Apex Court in **C.B. Gautam vs. Union of India & ors. reported in 199 (1993) ITR page 530** laid down that the transferor and the transferee must get a reasonable opportunity. Accordingly, sub-section (1A) was added in Section 269UD with effect from 17.11.1992. This sub-section (1A) reads as follows:-

> " (1A) before making an order under sub-section (1), the appropriate authority shall give a reasonable opportunity of being heard to the transferor, the person in occupation of the immovable property if the transferor is not in occupation of the property, the transferee and to every other person whom the appropriate authority knows to be interested in the property. "

He, therefore, submitted that it was clear that the transferee had to be given a notice before any order was passed under Section 269 UD(1).

8.(i). The respondents relied upon the order sheet of 16.2.1995 which recorded the presence of Mr.Balghat and Mr.Deo before the competent Authority on that date. An inspection thereof was

given to the petitioner.

(ii). The petitioner, therefore, has filed the affidavit of the said Mr.D.G. Deo affirmed on 13.11.2006. The said Mr.Deo in this affidavit has stated as follows:-

> " 1. I was the General Manager (Legal Services) of the Respondent No.5 till 31st October 2006.
>
> 2. In response to notice of hearing received from the Appropriate Authority, I along with Mr.B.D. Mehta, the Manager (Taxation) of Voltas Ltd., the Respondent No.5 and Mr.Balghat, the Chartered Accountant of Respondent No.5, attended the hearing before the Appropriate Authority at Poona on 16th February 1995. I say that it has been wrongly noted in the order sheet that I had appeared for the transferee, namely, the Petitioner herein. I never appeared for the transferee and I was never employed by them. I further say that I had not signed the order sheet dated 16th February 1995."

(iii). The respondents have thereafter placed the order sheet on record along with the affidavit of one Mr.G.M. Chauhan, Assistant Commissioner of Income-tax in the office of the Appropriate Authority affirmed on 24th November 2006. He has annexed thereto notings of the hearing. These notings also include the notings of 16th February 1995 which are to the following effect:-

> " 16/2/95 - S/Shri B.D.Mehta, General Manager of Transferor Firm with Balghat, Chartered Accountant and D.G. Deo for transferee Company. Written submissions filed.
>
> Sd/-
>
> Sd/-
>
> Sd/- "

(iv). Mr.Pardiwala pointed out that there is no counter of the respondents to the affidavit of Mr.Deo. He submitted that Mr.D.G. Deo was never employed by the petitioner and did not represent them at the time of this proceeding. Similarly Mr.Balghat was Chartered Accountant of respondent No.5 and not of the petitioner and these facts can be ascertained from the audited report of the 5th

respondent.

9.(i). The case of the respondents is that the offices of the petitioner and respondent No.5 are situated in the same building at Ballard Estate and the notices were sent to both of them. It is contended by Mr.Sethna, learned Counsel appearing for respondent Nos.1 to 4 that if the notice was received by respondent No.5 there is no reason to accept the submission of the petitioner that it had not received the notice. On this submission, it is stated by Mr.Pardiwala that, in any case, on 15th February 1995 the matter was adjourned to 16th February 1995. Apart from the fact that this was a very short adjournment, there is no record with respondent Nos.1 to 4 to show that any intimation was given to the petitioner. He, therefore, submits that this is in gross violation of the requirements of giving a reasonable opportunity which is now statutorily incorporated in the above-referred Section 269UD (1).

(ii). That apart, Mr.Pardiwala pointed out on merits of the order under challenge that in the representation of respondent No.5, it has clearly sought sufficient time to make inquiry about the comparable property. Surely, that ought to have

been given. Interestingly, now the petitioner has filed an affidavit of its General Manager Mr.Mohan Purandare affirmed on 16th October 1996, to which he has enclosed a certificate of an Advocate A.B. Arjunwadkar dated 30th March 1995. The learned Advocate made inquiry about the comparable property and has stated in his certificate that this transaction has not gone through at all. He has placed on record the entries from 7/12 extract of the concerned property to point out that the comparable property continued with one Mr.Narendra Agarwal who is supposed to have agreed to sell the said property bearing Survey No.39/2 /1A at Vadgaon Sheri through the Agreement dated 27.8.1992 for Rs.51 Lakhs but the said comparable transaction has not gone through at all. Mr.Pardiwala, therefore, submits that if the petitioner or respondent No.5 was given sufficient time, they would have surely placed this information before respondent Nos.1 to 4 and in which case the impugned order would not have been passed. He further submits that in any case now that this information is available, it is clear that there is no such comparable instance at all of a completed sale transaction, on the basis of which it could be said that the petitioner has indulged into under-valuation. Mr.Pardiwala,

therefore, submits that the impugned order is unjustified on merits, apart from being in violation of the statutory requirement of providing the reasonable opportunity under Section 269UD (1A) of the said Act.

10. Mr.Sethna, learned Counsel appearing for respondent Nos.1 to 4, submitted that under the second proviso to Section 269UD, the statutory time-frame for the appropriate Authority to pass the order was restricted to only three months in the cases of statements received after 1st June 1993. That being the position, when the 37-I Form was lodged on 30th November 1994, the time available was only upto 28th February 1995. It is the case of respondent Nos.1 to 4 that the Government got the relevant information only on 23rd January 1992 and thereafter the notice was issued on 9th February 1995 calling the party for the inquiry on 14th February 1995. The proceeding had to be completed by 28th February 1995 and, therefore, longer time could not be given. Mr.Pardiwala submitted thereupon that in any case there was still time of about 13 days after 15th February 1995 and surely, respondent Nos.1 to 4 could have granted the time to the parties of at-least one week, if not more.

11. That apart, Mr.Sethna objects that the petitioner has no locus to file the present Petition to challenge the order of compulsory purchase and that it is only the transferor who could be considered to be the person interested as defined under Section 269UA(e) of the said Act and that the Petition ought to be dismissed on that ground itself. This definition under Section 269UA(e) reads as follows:-

> " (e) "person interested", in relation to any immovable property, includes all persons claiming, or entitled to claim, an interest in the consideration payable on account of the vesting of that property in the Central Government under this Chapter."

As far as this submission is concerned, Mr.Pardiwala submitted that the definition of "person interested" will be relevant for the purposes of deciding as to whether the persons are entitled to lay a claim or interest in the consideration. It cannot mean that other persons who have an interest in the property cannot challenge such an impugned order by invoking

Article 226 of the Constitution of India. He submitted that in view of the addition of sub-section (1A) in Section 269UD (which is quoted earlier) the transferee had the right to have a reasonable opportunity before the order of compulsory purchase was passed. If that was so, surely, the transferee had the right to challenge the order since it was aggrieved by the same. It could not be said that the petitioner had the right of a reasonable opportunity at the level of the Appropriate Authority but it could not challenge the decision given by the appropriate Authority. Surely, such a submission cannot be entertained.

12. That apart, Mr.Pardiwala relied upon a few authorities to point out the trend of the judgments in this behalf. To begin with, he referred to a judgment of a Division Bench of the Karnataka High Court in **Rajata Trust vs. CIT reported in (1992) 193 ITR page 220** which is against him and which held that the transferee could not challenge the order of the appropriate Authority directing purchase of the immovable property under Section 269UD. The Division Bench had taken the view that the purchaser is not included in the definition of "persons interested"

and, therefore, had no right to present a Writ Petition under Article 226 of the Constitution of India.

13. This judgment was cited before a Single Judge of the Calcutta High Court (Smt.Ruma Pal, J. as Her Ladyship then was in that Court) in **Hari Krishna Kanoi and anr. vs. Appropriate Authority reported (1994) 207 ITR page 743.** The learned Judge took the view that the concept of locus standi is much wider than the concept of a person having an interest in the property. The learned Judge observed that the person may be interested in the property without having an interest therein within the legal connotation of the phrase "interest in property". The learned Judge has made it clear that the definition of the phrase "person interested" applies in connection with and is limited to the requirements in the provisions of Chapter XX-C itself. The learned Judge has observed that any other interpretation will mean that the writ petitioners will be deprived of the valuable right of purchasing the property in question, the right which has been recognised and which is otherwise protected under Section 40 of the Transfer of Property Act, 1882 and the Specific Relief Act, 1963.

14. It is material to note that this judgment in the case of **Hari Krishna Kanoi** (supra) was rendered on 11th September 1992 i.e. two months prior to the judgment rendered by the Apex Court in **C.B. Gautam's case (supra)** decided on 17th November 1992 and reported in (1993) 199 ITR page 530. In this judgment, the Apex Court in clear terms held that a reasonable opportunity will have to be given to the parties concerned, particularly the intending purchaser and the intending seller and that must be read into the provisions of Chapter XX-C. This was when the provision referred in sub-section (1A) was not included in Section 269UD. The judgment in C.B. Gautam's case (supra) led to the insertion of this sub-section. This sub-section requires the appropriate Authority to afford a reasonable opportunity to four parties viz. (1) the transferor, (2) the person in occupation, (3) transferee and (4) the person interested. The said sub-section became effective from 17th November 1992 and the show cause notice in the present matter is undoubtedly issued subsequent thereto.

15. It was then submitted on behalf of the

respondents that if respondent No.5 - Voltas Limited has not challenged the purchase order, there was no reason for the petitioner to challenge the same. This is because the only effect of the impugned purchase order would be that the petitioner will become the lessee of the Central Government instead of that of respondent No.5. Mr.Pardiwala pointed out thereupon that the factual position is, however, not so. Immediately after passing of the order of compulsory purchase on 23rd February 1995, the respondents served a Notice dated 23rd February 1995 on the petitioner informing them that the property had already vested in the Central Government and the possession of the property will be taken from the transferor on 15th March 1995. The transferor was, therefore, directed to deliver the vacant possession of the property on 15th March 1995 to the authorised person. It is this threat that led the petitioner to file the present Petition which it has filed on 13th March 1995 and to take an order on the same day to stay the implementation of the impugned order of compulsory purchase.

16. With respect to the submission of the respondents that they did not have much time to afford a detailed hearing, Mr.Pardiwala pointed

out that the Agreement dated 11th November 1994 was lodged on the same day along with the Form 37-I. The Valuation Officer from the Income Tax Department thereafter sought certain information from the petitioner by his letter dated 29th November 1994. Within about ten days the petitioner forwarded the necessary information to him by its letter dated 8th of December 1994. The Appropriate Authority took more than a month and 10 days thereafter to take inspection of the property which it has inspected on 18th January 1995 and raised certain queries, with respect to which the petitioner wrote immediately on 23rd January 1995. In paragraph 1.6 of this letter it was placed on record that Voltas has transferred its entire shareholding in Voltas Transformers Ltd. to Kirloskar Group of Companies on 1.12.1994. Mr.Pardiwala points out that except this statement nothing new was stated in this letter. If the respondents wanted to issue a show cause notice to the petitioner and had a time constraint surely they could have issued it immediately but it was issued after 15 days on 9.2.1995 and served on the transferor on 14th February 1995 as pointed out earlier. When the transferor sought time on 15.2.1995, the matter was adjourned only to the next day. Surely, the

respondents had time until the end of February 1995 and the matter could have been adjourned atleast by about one week when some further information about the comparable property could have been obtained by the parties and made available to the respondents. This opportunity was denied.

17. Mr.Pardiwala then took us through the judgment in the case of C.B. Gautam (supra) extensively. While recording the submissions of the learned Attorney General in that matter, it is recorded that according to the Central Government as far as the transferee was concerned he could not be said to have any interest in the property which he had to purchase. It was contended that after the deletion of Article 19(1)(f) of the Constitution an intending purchaser could not have a fundamental right to acquire immovable property. Thereafter the judgment recorded the government's submissions as follows:-

> " It was submitted that, although a transferee might be a person aggrieved for the purposes of article 226 of the Constitution, he could not have any serious grievance on the ground of

> violation of the principles of natural justice as he could always challenge the order of purchase as arbitrary by filing a petition in a court of law and on such a petition the authorities would have to disclose the reasons to satisfy the court that they had acted on relevant considerations germane to the object of Chapter XX-C in taking the decision to purchase the property. "

The judgment thereafter refers to the historical setting in which these provisions were enacted. Thus, it refers to the fact that earlier Section 52 was introduced in the Income Tax Act which dealt with the consideration for transfers in cases of under-statement. Under the scheme of the section if there was any such under-statement exceeding 15%, so much amount will be added to the income of the assessee. Thereafter Chapter XX-A was added in the Act which dealt with "Acquisition of immovable properties in certain cases of transfer to counteract evasion of tax". Section 269C(2) provided that where the difference was more than twenty-five per cent, an appropriate action of compulsory purchase would be resorted to. This chapter operated between 15.11.1972 and

30.9.1986. Subsequently Chapter XX-C has been introduced with effect from 1.10.1986. The Court has referred to the affidavit of one Mr.H.K. Sarangi, Under Secretary of CBDT wherein it is stated that where the apparent consideration is 15 per cent above the normal purchase price, necessary steps will be taken under this chapter. It is material to note that this judgment later-on records that there might be other genuine reasons which might have led the seller to agree to sell the property to a particular purchaser at less than the market value. The Court, therefore, held amongst other reasons that the requirement of a reasonable opportunity being given to the concerned parties, particularly the intending purchaser and intending seller must be read into the provisions of Chapter XX-C. The Court observed that the parties must be given an opportunity to show cause that there is no tax evasion since the basis of this entire provision is to take action in cases of tax evasion. The Apex Court also rejected the argument that giving of reasons can be a substitute to affording a hearing. Reasons are to be given for two different purposes firstly, so that the party aggrieved must know as to what were the reasons, as also the higher authority like the High Court

or the Supreme Court if further action is required to be taken and secondly, it should act as a deterrent against arbitrary action by quasi judicial or executive authority.

18. The judgment next referred to was in the case of **Appropriate Authority & ors. vs. Mass Traders Pvt.Ltd. & ors. reported in (1993) 292 ITR page 741** rendered by the Karnataka High Court. This is a judgment rendered subsequent to one in C.B. Gautam (supra) and in view of the judgment in Gautam's case, the Karnataka High Court in terms held that the judgment of that High Court rendered earlier in Rajata Trust's case (supra) could no longer govern the field. Points Nos.2 and 3 framed in this judgment were with respect to right of hearing of a purchaser before the Appropriate Authority to show cause and the purchaser's right to challenge the order of the Appropriate Authority subsequently. On both these counts, the Division Bench held in favour of the purchaser.

19. The next judgment relied upon is in the case of **Shrichand Raheja & anr. vs. S.C. Prasad (Appropriate Authority) & ors. reported in (1995) 213 ITR page 33.** This was a Petition filed by the

transferor. That Petition has been decided along with another Petition filed by the transferee and following upon the judgment in C.B.Gautam's case, a Division Bench of this Court held that the transferee had a right to have the hearing before a competent Authority and then to file a Writ Petition. Similar view is taken by another Division Bench of this Court in **S. Krishnan vs. U.V. Shahadadpuri & ors. reported in (1999) 275 ITR 274**. The Division Bench has held that even if the transferor does not challenge the order of compulsory purchase, the transferee certainly can.

20. The same is the approach in the judgment of a Division Bench of the Gujarat High Court in **Ketki Land Holdings Pvt. Ltd. vs. Appropriate Authority & anr. reported in (1997) 227 ITR 825**. That was also a Petition filed by a purchaser. The Allahabad High Court has also taken the same view in **Ashok Kumar Sood vs. Deputy Commissioner of Income-Tax & ors. reported in (1995) 216 ITR 193** which was also a Petition filed by a purchaser.

21. There are a few judgments in a slightly different situation. Thus in **K. Basavarajappa vs. Tax Recovery Commissioner & ors. reported in**

**(1997) 297 ITR 297**, an assessee was in default in payment of income tax dues assessed against him. He was served with a notice under Rule 2 of Second Schedule to the Income Tax Act. Thereafter the assessee entered into an agreement to sell this property to the appellant but failed to execute the sale. The appellant filed a suit for specific performance. The tax recovery officer thereafter attached the property and brought it to sale. The appellant filed an application under Rule 60 of the Second Schedule to set aside the sale and deposited the arrears of tax with interest under an authority from the assessee. The question was whether such a purchaser could file an application under Rule 60 of the Rules in Schedule II to the Income Tax Act which permits a defaulter or any person whose interests are affected to apply to the Tax Recovery Officer to set aside the auction on depositing the amount specified in the proclamation of sale. The Supreme Court held that such a person had no locus. Surely, it is a situation which is clearly distinguishable from the one of a bona fide purchaser of a property which subsequently comes to be purchased compulsorily. Similar is the judgment in **Union of India & ors. vs. Shatabadi Trading and Investment P.Ltd. & ors. reported in (2001) 94**

**ITR 93**. In the facts of that case third party rights were created in pursuance of an earlier order of the Supreme Court and it was, therefore, in that context that the Apex Court held that the High Court should not have interfered into the rights of such a party at the instance of a purchaser. This judgment will have to be construed as a judgment to give effect to the orders passed by the Apex Court under Article 142 of the Constitution of India. The Apex Court has referred to the judgment in K. Basavarajappa (supra) in support in this matter. However, as pointed out above, the facts of Basavarajappa's case were quite different and so were the facts of Shatabadi's case (supra).

22. There are two judgments of two Division Benches of this Court, to which one of us (Devadhar, J.) was a member. The first is in the case of **Smt.Vimla Devi G. Maheshwari & anr. vs. D.D. Mohindra & ors. reported in (2004) 268 ITR 102**. It must be first noted that the transaction in this case was one prior to the judgment in C.B. Gautam's case (supra) and before the introduction of the relevant amendment granting a reasonable opportunity to the purchaser. Secondly, it is material to note that the purchaser had not paid

the price, though his Petition was admitted and he had the option to make payment. As against that, when the property compulsorily purchased was auctioned by the Government, the auction purchaser paid the full money and the transferor had received the entire consideration from the Government. The judgment of the Division Bench that such a purchaser had no right to file the Petition, will have to be confined to the facts of this case and cannot be read to mean that the purchasers do not have a locus to challenge the order of the competent Authority. Similar view is taken in the case of **Ellora Construction vs. M.B. Kondani, Chief Engineer (unreported order dated 20.9.2005 in Writ Petition No.1822 of 1993)**. In this matter, the petitioner claimed to be a developer and claimed an interest in the property which was acquired. A developer has no right of specific performance as held by the Single Judge of this Court in **The Peerless General Finance & Investment Co.Ltd. vs. Swan Mills Limited & ors. reported in 2000 (1) Bom. C.R. 48.** On the same footing, the Division Bench held that the developer had no right if the owner's property was acquired and, therefore, he could not file any Petition to challenge the same. The two judgments are clearly distinguishable on facts and cannot be

read to lay down the law that the purchaser has no right to file a petition when the property which he wanted to purchase is acquired compulsorily under Chapter XX-C of the said Act.

23. The next and alternative submission of Mr.Pardiwala is that assuming that the petitioner could be said to have been heard on 16.2.1995 due to the presence of Mr.Deo and Mr.Balghat, the order that was passed could still not be said to be sustainable. He relies upon Grounds (h) to (q) in the Petition. Mr.Pardiwala submitted that the impugned order did not contain any reasons to justify an order of compulsory purchase. He submitted that any such order must record as to what is likely to be the fair market value of the property and that due to the undervaluation, tax is going to be evaded. In the present case, nothing of the kind is disclosed in the order. In support of this proposition, he referred us to a judgment of a Division Bench of this Court in **Vimal Agarwal vs. Appropriate Authority & ors. reported in (1994) 210 ITR page 16**. The Division Bench referred to the judgment in C.B. Gautam's case (supra) and held that it flows therefrom that the Appropriate Authority must arrive at the figure of fair market value of the property in

question, without which it is impossible to hold that the apparent consideration is lower by more than 15 per cent. The Division Bench carved out the following propositions from the decision in C.B. Gautam's case (supra):-

> " The above decision of the Supreme Court, in our opinion, is a complete answer to the controversy in the instant case. The following propositions emerge from the above judgment :
>
> (i) The provisions of Chapter XX-C are to be resorted to only when there is significant undervaluation in the agreement of sale with a view to evade tax.
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> (ii) An order of compulsory purchase of immovable property can be made only if the appropriate authority is satisfied that in the agreement to sell immovable property, the apparent consideration as shown in the agreement is less than the fair market value by 15 per cent or more. In such a case the appropriate authority may draw a presumption that this undervaluation has

been done with a view to evade tax.

(iii) Though a presumption of attempt to evade tax could be raised by the appropriate authority concerned in case the aforesaid circumstances are established, such a presumption is rebuttable and this would necessarily imply that the concerned parties must have an opportunity to show cause as to why such a presumption should not be drawn.

(iv) A reasonable opportunity of being heard and to show cause should be given to the concerned parties, particularly the intending purchaser and the intending seller.

(v) There might be several bona fide considerations which may induce the seller to sell his immovable property at less than the fair market value such as : (a) he might be in immediate need of money and unable to wait till a buyer is found who is willing to pay the fair market value for the property; (b) there might be some dispute as to the title to the immovable

> property, as a result of which it might have to be sold at a price lower than the fair market value; or (c) there might be a subsisting lease in favour of the intending purchaser. These examples are merely illustrative and not exhaustive. There might similarly be other genuine reasons which might have led the seller to agree to sell the property to a particular purchaser at less than the market value even in cases where the purchaser might not be his relative. "

24. The Division Bench, therefore, held that the Appropriate Authority must consider all the relevant factors carefully and record its reasons for passing the order. The reasons given with the show cause notice and/or the sale instances specified therein should be carefully scrutinised. The instances furnished by the aggrieved parties cannot be brushed aside and no order can be passed without carefully considering the same and stating the reasons for not treating the same as comparable cases. It is further observed that each property is unique and two properties can hardly be totally alike. Therefore, various allowances have to be made for difference in

qualities between two properties or flats. It is only after considering the attending circumstances that the fair market value must be arrived at on evidence on record. It cannot be a guess work. A sort of balance-sheet of plus and minus factors is expected to be drawn. Ultimately the right of pre-emptive purchase of the Revenue can be exercised only in cases where there is significant undervaluation in the agreement of sale with a view to evade the tax.

25. This judgment has been followed and the same approach is taken by other High Courts also. Thus, in **Sarwarben Temas Khambata & ors. vs. Appropriate Authority reported in (1995) 216 ITR 850**, a Division Bench of the Gujarat High Court held as follows:-

> " In order to draw an inference of undervaluation, it is necessary to determine first the fair market value of the property in question in the light of all attending circumstances. Without doing so, it is not only difficult but impossible to say that the apparent consideration is lower than the fair market value by 15 per cent or more. The

> figure of fair market value cannot be left to conjectures and surmises, and to justify the order under section 269UD(1) of the Income-tax Act, 1961, the appropriate authority must come to a definite conclusion that the undervaluation is by more than 15 per cent of the fair market value. "

A Division Bench of the Madhya Pradesh High Court has taken a similar view in **Himmatlal Vadalia & ors. vs. Union of India & ors. reported in (1998) 232 ITR 854**.

26. In **Laboni Developers vs. Appropriate Authority & ors. reported in (1996) 219 ITR 284**, another Division Bench of the Gujarat High Court referred to the propositions in C.B. Gautam's case (supra) that the provisions of Chapter XX-C were intended to be resorted to " only in cases where there is an attempt at tax evasion by significant undervaluation of immovable property agreed to be sold". The Court further held that merely on the finding that the apparent consideration is less than fair market value without there being any satisfaction that the apparent consideration is not the real

consideration, the nexus cannot be established with an attempt to evade tax. In **Ashok Kumar Sood's case** (supra), a Division Bench of the Allahabad High Court held that where the price given is undervalued by more than 15% then the presumption may be drawn that it may be for the purpose of evading tax. However, it is a rebuttable one. It would depend upon the facts of each case. It may be that even if the property is undervalued, the record may suggest that undervaluation is not for evading the tax. Then the pre-emptive purchase of the property under Section 269UD of the Income-tax Act would be illegal.

27. In the present case, Mr.Pardiwala points out the Sale Instance Property (SIP) is situated at Vadgaon which is far away from Lohagaon where the Property Under Consideration (PUC) is situated. SIP is a case of sale whereas PUC is a case of lease. PUC is Survey No.140/2. PUC is sub-plot No.1 of Survey No.140/2 which is marked as sub-plot 'X'. In the lease agreement it consists of the area of 39,545 sq. meters. To a query from the Valuation Officer, a reply dated 8.12.1994 was sent by the transferor - respondent No.5. Respondent No.5 annexed thereto the

exemption order under Section 20 of the Urban Land Ceiling Act as also the letter dated 4.8.1994 sent by them to the Directorate of Industries, to which they had enclosed the Report dated 28.7.1994 of their Architects M/s.S.S. Rawat & Associates. This report gave the particulars of area utilization of this plot No.1 and which shows ultimately that there is hardly any vacant land after considering the built up area permissible,

land appurtenant to the balance built up area, open spaces, recreation space, internal roads, DP roads, etc. He, therefore, submitted that it is absurd for the Union of India to acquire the leasehold rights from the transferor for the consideration of Rs.80 Lakhs. If it is a case of the Revenue that at the highest the petitioner will become lessee of the Central Government or whoever is the purchaser, the Government will be putting an amount of Rs.80 Lakhs for getting just lease rent of Re.1/- per year. No sensible party will take any such step.

28. Mr.Pardiwala, therefore, submitted that the order was bad even on merits.

29. Mr.Sethna, learned Counsel appearing for the Revenue, submitted that it was not permissible for the petitioner to raise the question of breach of natural justice. He further submitted that firstly one cannot accept that the purchaser had not received a notice of hearing. The offices of the petitioner and respondent No.5 are situated in the same building. If respondent No.5 had received the notice one can certainly draw an inference that the petitioner had also received it. The Appropriate Authority recorded the presence of Mr.Deo and Mr.Balghat as appearing for the petitioner on 16.2.1995. They have signed below the noting concerned. It is a presumption that the official notings are correct and there was no reason for the officer concerned to record anything wrong. He submitted that the petitioner knew that as per the impugned order dated 23rd February 2005 according to the Appropriate Authority Mr.Deo and Mr.Balghat represented the petitioner. It is true that in the Petition this aspect is denied by making specific averment on page 15 and the Petition is filed immediately on 13th March 2005. Mr.Sethna has now, however, relied upon a photo copy of the original of the notings which record the presence of Mr.Deo and Mr.Balghat as representing the petitioner. He

submits that though Mr.Deo is now saying that he did not represent the petitioner since the petitioner is a wholly owned subsidiary of respondent No.1, it is quite often that the officers of such principal companies do represent the subsidiary. Mr.Sethna, therefore, submitted that it cannot be said that the petitioner had no notice.

30. Mr.Pardiwala pointed out that in any case on behalf of Voltas, time was sought in answer to the notice which was not permitted. The comment of Mr.Sethna thereon was that if that was so, Voltas should have challenged the order which it has not. There is no reason for the petitioner to challenge the impugned order.

31. With respect to the nature of the right of hearing, Mr.Sethna referred to a couple of judgments. Firstly, he relied upon a judgment in the case of **Sohanlal Gupta (dead) through Lrs. & ors. vs. Asha Devi Gupta (Smt.) & ors. reported in (2003)7 SCC 492** and then in **N.K. Prasad vs. Government of India & ors. reported in (2004) 6 SCC 299** to submit that the principles of natural justice are not a strait-jacket formula and that prejudice ought to be shown as resulting from the

so-called denial of a fair opportunity.

32. From the above narrations and submissions, the position emerging is as follows:-

(a). The petitioner was the purchaser of the property under consideration and it is its contention that it was entitled to a hearing before the order of compulsorily purchasing the said property was passed by respondent Nos. 1 to 3. This position is recognised under sub-section (1A) introduced in Section 269UD of the Income Tax Act, 1961 with effect from 17th November, 1992. The petitioner contends that the show-cause notice issued by the Appropriate Authority, being dated 9th February, 1995, was not served on it at all; and that the impugned order is an ex parte order passed in violation of the principles of natural justice, and in any case, in violation of the statutory provision which mandates a prior hearing to the transferee. The submission of the Revenue is that the very notice was served on respondent No. 5, the transferor, in the evening of 14th February, 1995. The transferor is having its office in the same building as the transferee, and it is inconceivable that the transferee did not receive the notice. No acknowledgment of service

is, however, relied upon. Thus, the Revenue is seeking to draw a presumption from the fact of service on the transferor.

(b). The Revenue also contends that two of the officers, who attended the hearing on 16th February, 2005, i.e., Mr. Balghat, Chartered Accountant, and Mr. D.G. Deo, an officer, represented the transferee-company. The Revenue relies upon the noting made by the Appropriate Authority on 16th February, 1995. This noting entered in an order-sheet was offered for inspection when the matter was part-heard in this Court. The petitioner, therefore, filed an affidavit of Mr. Deo, the officer, who was supposed to have remained present at the time of hearing. The affidavit, affirmed on 3rd November, 2006, clearly stated that Mr. Deo was, at all material times, an officer of respondent No. 5 and not of the petitioner, and Mr. Balghat was also the Chartered Accountant of respondent No. 5. The Revenue has placed the said noting on record through an affidavit affirmed on 24th November, 2006. The fact that Mr. Deo and Mr. Balghat were an employee and Chartered Accountant of respondent No.5 respectively can be ascertained from their audited accounts, duly published.

(c). It was thereupon submitted by the Revenue that in any case, the petitioner was a fully-owned subsidiary of respondent No. 5 earlier; and, therefore, these officers could be said to have represented the petitioner. Thus, the Revenue is trying to establish the compliance with the statutory requirement on the basis of inferences, as against which the assertion of the petitioner is that the petitioner did not have any notice of hearing.

(d). The second submission of the petitioner is that in any case, respondent No. 5 had sought time, and was given only one day for that purpose. It is submitted on behalf of the petitioner that the Revenue had itself not moved in this matter with appropriate speed earlier as pointed out and assuming that there was a time-constraint, at least one week could have been surely given, since the proceedings had to be completed by end of February, 1995. As far as this submission of the petitioner is concerned, Mr Sethna has contended, on behalf of the Revenue, that it was for respondent No.5 to raise a grievance by filing a Petition for that purpose, and not for the petitioner.

(e). Apart from the above submissions with respect to compliance of the principles of natural justice and the statutory provisions in that behalf, the petitioner contends that there was right to challenge the impugned order of compulsory purchase on its merits; and as far as that aspect is concerned, the locus of the purchaser cannot be disputed, inasmuch as once the purchaser / transferee is given the right to audience before the Appropriate Authority, obviously, the transferee cannot be denied the right to challenge the impugned order subsequently under Article 226 of the Constitution. The petitioner has placed material on record of this petition to point out that the property, which is pressed into service for comparison, is situated in an altogether different area of the city and is totally dissimilar in various respects, and it is a sale-transaction which has not gone through at all. The petitioner has placed the 7x12 Extract on record to submit that the said comparable property continues under the ownership of the party which wanted to transfer. The submission of Mr. Sethna, thereupon, is that the Revenue cannot be in the know of this further development, and the purchase cannot be vitiated on that ground.

33. Now, whatever may be the constraints of the Revenue, the Appropriate Authority is supposed to pass an order of compulsory purchase only on the basis of transactions which it considers as the transactions reflecting the correct value of the property concerned. Mr.Pardiwala, learned Counsel appearing for the petitioner, submits that to defeat a transaction of sale in a given case, another proposed agreement can be relied upon, though it may not have gone through or may not go through in future. On this ground also, in his submission, the order of compulsory purchase is required to be interfered with.

34. We have noted the factual situation as also the submissions made by both the Counsel appearing for the parties. We have also noted the legal position in this matter and the circumstances leading to the present statutory provision. It is quite clear that the provision has been introduced with a view to avoid evasion of tax as well as the illegal use of black money for that purpose. Merely because there is a statutory provision, it does not mean that the Revenue ought to acquire properties on mere apprehension. In the instant case, as far as the notice to the petitioner in the inquiry prior to

the impugned order is concerned, the Revenue is relying merely on presumptions. This is as against the assertion of the petitioner that there is no service of such notice on the petitioner. The petitioner was entitled to an appropriate notice. In paragraph 15 of the reply dated 16th December, 1995 filed by respondent No.5, it has clearly brought to the notice of the Appropriate Authority that the transferee, i.e., the petitioner herein, did not appear to have received the notice till 15th February, 1995. Since this was clearly placed on record before the Appropriate Authority, it ought to have seen to it that a notice was given to the petitioner. The Appropriate Authority had chosen to record on 16th February, 1995 that Mr. Deo and Mr. Balghat represented the transferee. This has been brought to the notice of the petitioner only during the course of the present proceedings when it has promptly denied the same. Obviously, if Mr. Deo and Mr. Balghat represented the petitioner on 16th February, 1995, they would have brought to the notice of the Appropriate Authority the submissions on behalf of the petitioner. From what is stated above, it is clear that the impugned order is passed without compliance of the provision under sub-section (1A) introduced in

Section 269UD of the Income Tax Act, 1961, which operated at the relevant point of time. The order, therefore, suffers from denial of natural justice incorporated in the said statutory provision.

35. That apart, as stated above, the sale instance, which is sought to be relied upon, is not comparable at all. The present case is of lease, whereas the comparable instance relied upon is that of sale. The present transaction is between a Company and its wholly-owned subsidiary. The considerations are bound to be different. That apart, the transaction, which is relied upon as the comparable instance, has not gone through. For these reasons, it is difficult to hold that the impugned order can be sustained either on principles of natural justice or on the merits thereof.

36. In the circumstances, the Petition is allowed and the impugned order of compulsory purchase dated 23rd February 1995 passed by respondent Nos.1 to 3 under Chapter XX-C of the Income Tax Act is quashed and set aside. Rule is accordingly made absolute.

37. We, however, do not order any costs of the matter.

**(H.L. GOKHALE)**
**Acting C.J.**

**(J.P. DEVADHAR, J.)**